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No. 1069

In the Supreme Court of the United States

OCTOBER TERM, 1945

GREAT LAKES DREDGE AND DOCK COMPANY,
PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Claims (R. 34–39) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on January 7, 1946 (R. 39). Petitioner's motion for a new trial was overruled on January 7, 1946 (R. 10). The petition for a writ of certiorari was filed on April 6, 1946. The jurisdiction of this Court is invoked under Section 3 (b)

of the Act of February 13, 1925, as amended by the Act of May 12, 1939.

QUESTION PRESENTED

Whether the specifications in petitioner's dredging contract with the United States entitled petitioner to payment for certain excessive overdepth and side-slope dredging.

CONTRACT SPECIFICATIONS INVOLVED

The specifications of petitioner's contract with the United States provide, in part, as follows (R. 12–13):

> 1–08. *Physical Data.*—* * * Owing to the rapid currents the material in the dredged cuts is eroded when it is disturbed by the process of dredging. During the progress of recent contracts the prescribed cuts have been secured by the contractor after the removal of about 75 percent of the estimated quantity of material in the cut, scow measurement, including overdepth. The quantities of materials given in the specifications, are the estimated pay yardages and are 75 percent of the estimated quantities, scow measurement, that must be removed from the cuts.
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> * * * * *
>
> 4–03. *Overdepth and Side Slopes.*—To cover inaccuracies of the dredging process, material actually removed within the specific areas to be dredged to a depth of not more than 3 feet below the required depth

will be estimated and paid for at full contract price.

The contracting officer will prescribe the overcuts to be made to prevent the encroachment of material from the sides of the dredged cut, and material actually removed on his order from the prescribed overcuts, whether dredged in original position, or after having fallen into the cut, will be estimated and paid for. Material taken from beyond the limits as extended in this paragraph will be deducted from the total amount dredged as *excessive overdepth dredgin* [sic] *or excessive side-slope dredging* and will not be paid for.

STATEMENT

The facts, as found by the Court of Claims, may be summarized as follows: By a contract of June 6, 1936, with the United States, petitioner undertook certain dredging work in Cape Cod Canal, in Hog Island Channel in Buzzards Bay, Massachusetts, and in a channel leading to Onset Bay (Fdg. 1, R. 10–11). The specifications called for dredging of the Onset Bay Channel to a depth of 17 feet over a bottom width of 100 feet, and dredging of Cape Cod Canal and Hog Island Channel to a depth of 32 feet over a bottom width of 315 feet (Fdg. 4, R. 11–12). The specifications allowed an excessive depth of three feet, in each case at the full contract price, to cover inaccuracies in the dredging process (Fdg. 5, R. 13). The plans showed permissible side slopes of one

foot vertical to two and one-half feet horizontal, and material removed up to these side slopes was to be paid for (Fdg. 4, R. 12). It was further provided in the specifications (Par. 4–03, R. 13) that:

> The contracting officer will prescribe the overcuts[1] to be made to prevent the encroachment of material from the sides of the dredge cut, and material actually removed on his order from the prescribed overcuts, whether dredged in original position, or after having fallen into the cut, will be estimated and paid for. Material taken from beyond the limits as extended in this paragraph will be deducted from the total amount dredged as *excessive overdepth dredgin* [sic] *or excessive side-slope dredging* and will not be paid for.

The contract price (with exceptions not here relevant) was 34.25¢ per cubic yard of material removed (Fdg. 2, R. 11). Such material was to be measured in scows at the dredge, and when necessary for any cause to convert "scow measurement" into "place measurement" or the reverse, 115 yards of the former was to be the equivalent of 100 yards of the latter (Fdg. 5, R. 13). The location and limits of the work to be done were to be indicated by the contracting officer or his agents, by stakes and ranges, or otherwise (Fdg. 5, R. 12). Whether or not contract depth was being made was to be determined

[1] *i. e.*, additional cuts.

by soundings and sweepings taken behind the dredge as the work progressed; and if this survey disclosed any excess of overdepth or side-slope dredging, the excess was to be deducted from the monthly estimates of excavated material upon which monthly payments were to be made to petitioner (Fdg. 5, R. 13). The specifications (Par. 1-08) warned that "owing to the rapid currents the material in the dredged cuts is eroded when it is disturbed by the process of dredging", and that "during the progress of recent contracts the prescribed cuts have been secured by the contractor after the removal of about 75 percent of the estimated quantity of material in the cut, scow measurement, including overdepth" (Fdg. 5, R. 12).

Work was commenced by petitioner on July 1, 1936 (Fdg. 3, R. 11). Government engineers marked out by stakes and ranges the areas to be dredged (Fdg. 18, R. 26-27). In the Onset Channel, the side ranges were set at the outer contract limit line; in Cape Cod Canal and Hog Island Channel they were set 5 feet (later 7½ feet) inside the outer contract limit line (Fdg. 18, R. 26-27). No overcuts were prescribed by the contracting officer (R. 37). Notwithstanding petitioner's knowledge that erosion was considerable in the contract area (Fdg. 26, R. 31), petitioner dredged immediately up to the limits of the range on the stakes fixed by the Government engineers (Fdg. 26, R. 31), and uniformly

dredged, not merely to the required 17 and 32 foot depths, but to the maximum allowable overdepth, the dredge on many occasions going considerably beyond such depth (Fdg. 24, R. 30). All of the material removed was dredged within the limits indicated by the stakes and ranges (Fdg. 22, R. 29). During the dredging on the side slope, a large amount of material loosened by the dredge fell to the bottom, and the dredging operation also caused a large amount of the loose sandy material to erode, much of it being carried away by the current and some being deposited on the bottom (Fdg. 26, R. 31). Both erosion and fill continually took place in the canal, principally during the process of dredging. In some places where petitioner dredged beyond the pay limits, the excavated area would fill up when the tide changed, whereas at other places erosion would occur (Fdg. 29, R. 32–33).

Upon completion of the work on August 16, 1938, it was found (by surveys and place measurement converted to scow measurement) that there had been excessive side-slope dredging of 258,005 cubic yards and excessive overdepth dredging of 185,388 cubic yards, or a total excess of 443,393 cubic yards (Fdgs. 16 and 17, R. 26). Over petitioner's objection, this total was deducted by the contracting officer from the material placed in the scows, and his decision in this regard was sustained by both the Chief of

Engineers, and the Comptroller General (Fdgs. 8–15, 30; R. 14–26, 33).[2]

Thereupon, on February 12, 1942, petitioner instituted this suit in the Court of Claims to recover $151,862.11 for the 443,393 cubic yards in question, on the grounds that (1) the contracting officer had failed to prescribe overcuts to prevent encroachment of material from the sides of the dredged cut, (2) the sounding surveys for determining the progress of the dredging allegedly were unduly delayed, and (3) the deduction for excessive overdepth and side-slope dredging should have been reduced by 25% to eliminate material removed by erosion (R. 1–9, 34).[3] At the trial, petitioner claimed but failed to establish that the excess areas for which deductions were made for excess overdepth dredging were chiefly areas resulting from erosion (Fdg. 28, R. 32). There was no showing what part, if any, of the areas outside the contract limits on the bottom of the canal for which excess dredging

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[2] The rulings of the contracting officer and the Chief of Engineers had been made during the course of the work, when petitioner, on several occasions, had objected to deductions for excessive yardage made from the monthly estimates of material removed (Fdgs. 6–15, R. 14–26).

[3] In the petition filed herein, petitioner does not raise and apparently has abandoned the contentions made below that the sounding surveys were unduly delayed, and that deductions for excessive side-slope dredging (as opposed to excessive overdepth dredging) should be reduced by 25 percent to compensate for erosion (Pet. 5, 10).

was deducted should be attributed to erosion; but the evidence showed that areas in which the Government had determined that material was removed by erosion were excluded in making deductions for excessive dredging (Fdg. 28, R. 32). At the conclusion of the trial, the Court of Claims made findings of fact, and concluded as a matter of law that petitioner's complaint should be dismissed (R. 10–34).

ARGUMENT

The Court of Claims was clearly correct in dismissing petitioner's complaint, and its decision (which accords with the uniform ruling of the contracting officer, the Chief of Engineers, and the Comptroller General) presents no question of importance warranting review by this Court.

1. There is clearly no merit in petitioner's contention (Pet. 10) that it was "entitled to an adjustment of 25% for the erosion factor" in determining the amount of material to be deducted as excessive overdepth dredging. Were it not for petitioner's flagrant abuse of the 3 foot overdepth allowance, no overdepth problem would have arisen. The express purpose of the allowance was "to cover inaccuracies of the dredging process" (R. 13). Recognizing that the contractor would sometimes go below the desired contract depth in order to achieve that depth, the Government undertook to pay for the yardage

removed in the additional 3 foot area. From the start, however, petitioner viewed the overdepth allowance not as a tolerance, but as a means of swelling its return on the contract, and deliberately dredged to the maximum overdepth dredging limits. As the court below observed (R. 36): "If [petitioner] had followed the spirit of the contract and had not intentionally dredged below the depth of 32 feet, it is not unreasonable to assume that erosion would not have removed material below the 35-foot level, and no deduction would have been made from scow measurement for materials removed by erosion from below this level."

Petitioner's claim for an erosion adjustment on the overdepth deduction is otherwise ill-founded. The simple fact is that petitioner has failed to prove what effect erosion had upon the work. The Court of Claims expressly found that the evidence did not support petitioner's contention that the areas for which deductions were made for excess overdepth dredging were chiefly areas resulting from erosion (Fdg. 28, R. 32). The court further found that while there was erosion in the bottom, there was no proof showing what part, if any, of the areas outside the contract limits on the bottom of the canal should be attributed to erosion (Fdg. 28, R. 32). Moreover in areas where the Government determined that material was removed by erosion, no deductions were made for excess dredging (Fdg. 28, R.

32). In these circumstances, petitioner, as a matter of proof, has failed to make out a case for an erosion adjustment.

2. There is equally no merit to petitioner's contention (Pet. 10–12) that the contracting officer was under a duty to prescribe over-cuts and that his failure to do so entitled petitioner to payment for all the side-slope dredging without regard to the side slope specified in the contract. The contract carefully prescribed the desired depths, the overdepth tolerance, and the permissible side slope. While it provided that "The contracting officer will prescribe the overcuts to be made to prevent the encroachment of material from the sides of the dredged cut", and that "material actually removed on his order from the prescribed overcuts, whether dredged in original position, or after having fallen into the cut, will be estimated and paid for" (Specifications, par. 4–03; R. 13), it warned in the same paragraph, that "Material taken from beyond the limits as extended in this paragraph will be deducted from the total amount dredged as *excessive overdepth dredging* [sic] *or excessive side-slope dredging* and will not be paid for" (Italics in original). Since no overcuts were prescribed by the contracting officer, the Government properly refused to pay petitioner for anything beyond the side-slope specified in the contract.[4] As the court below pointed out (R. 38),

[4] During the course of the work on the Onset Channel, the Government's resident engineer allowed payment for 22,000

it was not "mandatory upon the contracting officer to prescribe any particular overcut"; he "might have prescribed an overcut of 10 feet, of 5 feet, of 3 feet, of 1 foot, or 6 inches, or none at all, depending upon what he thought was necessary under the circumstances." Since petitioner consistently dredged to the maximum overdepth allowance rather than to the desired depth, the contracting officer no doubt concluded that whatever material slid from the banks would not fill up the bottom of the cut beyond the desired depth, and hence that there was no necessity to prescribe any overcuts. Moreover, even if the contracting officer was under a duty to prescribe some overcut, breach of that duty still would not entitle petitioner to recover, for petitioner cannot show to what extent the excess is attributable to breach of that duty. In any event, the excessive side-slope dredging, like the excessive overdepth dredging, undoubtedly had its roots in petitioner's abuse of the overdepth allowance. Although petitioner dug within the range on the stakes fixed by the Government's engineers, its deliberate adherence to the maximum overdepth allowance undoubtedly caused a much larger amount of material to fall from the slopes than would otherwise have been the case.

3. The instant proceeding presents no questions of importance for determination by this Court.

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cubic yards of excessive side-slope dredging, other than that here involved. The contracting officer then ruled this payment improper, and proposed to make a deduction therefor, but no deduction was ever made (Fdg. 27, R. 31–32).

The particular controversy here involved stems primarily from a concurrence of two peculiar factual situations, namely the unusually strong current in the dredging area, and the decision of the petitioner to use the maximum allowable overdepth as its goal, rather than as a tolerance to compensate for errors in the dredging operation.

CONCLUSION

The decision below is clearly correct and there is no conflict.[5] It is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1946.

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[5] With respect to its claim for a 25% erosion allowance, petitioner asserts that there is a conflict between the decision below and the decisions in *Clark* v. *United States*, 6 Wall. 543; *Barlow* v. *United States*, 35 C. Cls. 514, and *Collins* v. *United States*, 34 C. Cls. 294, 332. Examination of these cases, however, discloses that none of them deals with dredging contracts or announces principles inconsistent with the decision below.

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